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No. 83-1944

In The
Supreme Court of the United States
October Term, 1984

HOLLY JENSEN, Director and
WILLIAM J. EDWARDS, Deputy Director,
Department of Motor Vehicles, State of Nebraska,

Petitioners,

vs.

FRANCES J. QUARING,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Does Nebraska's statutory requirement of a photograph on a driver's license constitute a burden upon the respondent's free exercise of her religion?

2. Is there a less restrictive alternative which will serve the state's compelling interest in the photograph requirement?

3. Does the creation of an exemption to the photograph requirement, based solely on religious grounds, contravene the Establishment Clause of the First Amendment?

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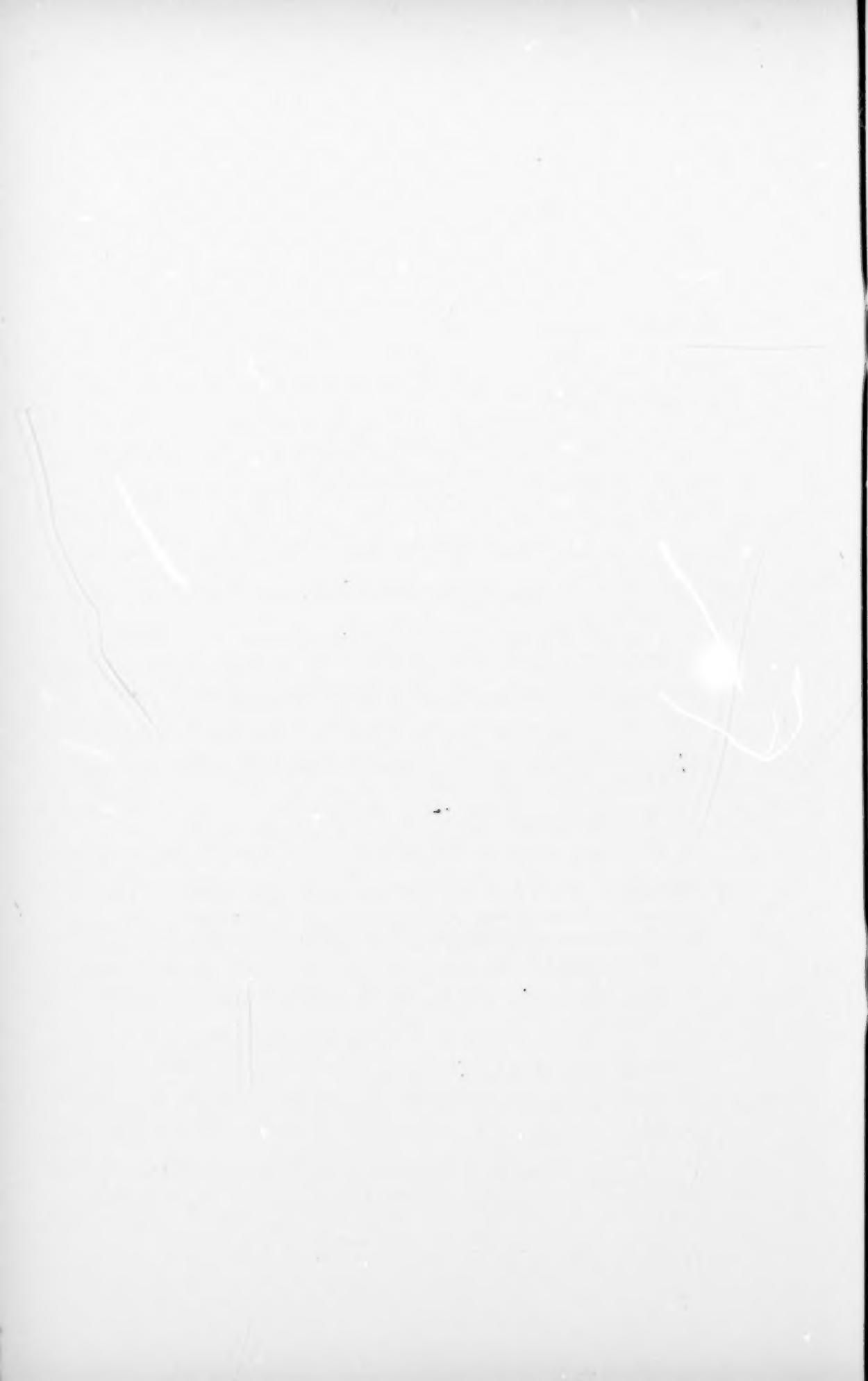
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CITATIONS TO THE OPINIONS BELOW

The opinion of the District Court for the District of Nebraska, No. CV82-L-346, slip opinion (D.Neb. October 15, 1982), appears at Pet. Cert. A1. The opinion of the Court of Appeals, 728 F.2d 1121 (8th Cir. 1984), appears at Pet.Cert. A16.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 1, 1984. A petition for certiorari was filed within ninety (90) days of that date on May 26, 1984. Certiorari was granted October 1, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

2. Neb.Rev.Stat. § 60-406.04 (1982 Supp.), Pet.Cert. A33.

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STATEMENT OF THE CASE

The respondent, Frances J. Quaring, sought a Nebraska driver's license, but refused to have her photograph affixed thereto as required by Nebraska law. Neb.Rev. Stat. § 60-406.04 (1982 Supp.) Pet. Cert. A33. She based her refusal on her literal interpretation of the Second Commandment which provides: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath or that is in the water under the earth." Exodus 20:4, Deuteronomy 5:8.

Mrs. Quaring believes that the Second Commandment is violated by the taking of a photograph. She possesses no photographs of her family, does not own a television set, and refuses to allow decorations in her home depicting floral designs, animals or other creations in nature.

After the denial of her application for a nonphotographic license, she brought an action in the United States District Court for the District of Nebraska claiming a violation of her civil rights. She alleged that the denial of her request infringed upon the free exercise of her religion in contravention of the First Amendment of the United States Constitution under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

The district court found that the state had shown two compelling interests in public safety on streets and highways and security of financial transactions relative to the requirement of a photographic driver's license. However, it concluded that the creation of an exception, on religious grounds, would not pose an administrative burden of such a magnitude so as to render the entire statutory scheme unworkable. This conclusion was based on its reasoning that the requirement was not the least restrictive alternative available. An injunction was issued prohibiting the petitioners from refusing to grant Mrs. Quaring a nonphotographic driver's license.

The judgment was affirmed by a split decision in the United States Court of Appeals for the Eighth Circuit. It found that the photograph requirement constituted a burden on the free exercise of Quaring's religious belief, and that the state's interest did not outweigh the burden imposed. It further found that the creation of an exemption on religious grounds would not cause any undue adminis-

trative burden, nor would the exemption and accommodation of Quaring's religious belief contravene the Establishment Clause of the First Amendment. Judge Fagg, Circuit Judge, dissented, finding that the state's interest was of sufficient magnitude to justify an indirect burden on respondent's free exercise of religion, and that an accommodation for her would "unduly interfere with fulfillment of a government interest." *Quaring v. Peterson*, 728 F.2d 1121, 1128 (8th Cir. 1984).

SUMMARY OF ARGUMENT

The nature of the interest in obtaining a driver's license is critical. It is the strong position of the state that this case should not have proceeded beyond a determination that the right to drive is not a constitutionally fundamental right. *Dixon v. Love*, 431 U.S. 105 (1977); *Montgomery v. North Carolina Department of Motor Vehicles*, 455 F.Supp. 338 (W.D.No.Car. 1978), *aff'd* 599 F.2d 1048 (4th Cir. 1979); *Wells v. Malloy*, 402 F.Supp. 856 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2nd Cir. 1976); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973); *Ruge v. Kovach*, 467 N.E.2d 673 (Ind. 1984). In the absence of a fundamental right, the requirement of a photograph must only bear a rational relationship to the statute's objective, which it clearly does. The photograph is directly related to the welfare and safety of the public and is well within the state's police power. The state's ability to regulate the use of its highways is broad and pervasive, and licensed drivers are subjected to a myriad of eligibility requirements and summary revocation and suspension procedures. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Mackey v. Mon-*

trym, 443 U.S. 1 (1979); *Bell v. Burson*, 402 U.S. 535 (1971).

Mrs. Quaring refused to comply with the requirement of a photograph because of her religious belief. Consequently, she could not obtain a valid Nebraska driver's license. She has no property interest in, or an entitlement to, a license as a matter of right. The lower court's description of this as a deprivation of a "benefit" under the rationale set forth in *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963), is in error. The receipt of social welfare benefits constituting subsistence is clearly distinguishable from the denial of a license because of Quaring's refusal to comply with one of the state's requirements. Absent a fundamental right to drive, Quaring's request for an exception does not present a free exercise claim.

Also lacking, as conceded by the court below, is any element of coercion which forces Quaring to choose between adherence to her faith and receipt of a benefit to which she is entitled. Her self-imposed decision to adhere strictly to her belief may cause inconvenience and added expense, but those reasons are insufficient to give rise to a free exercise claim. *Braunfeld v. Brown*, 366 U.S. 599 (1961). The absence of a fundamental right to drive, together with the lack of coercion to force Quaring to act in violation of her faith, compels the conclusion that there is no burden upon the free exercise of her religion. Absent proof of such a burden, it was unnecessary to engage in an examination of the state's compelling interest in photographic licenses or whether there existed a less restrictive alternative.

The requirement of a photograph on a driver's license serves the state's compelling interest in the ready and instantaneous identification of its licensed drivers. It is a unique means of identification, and no other alternative can achieve the same result. It is directly related to public welfare and safety, providing law enforcement and all those who rely upon it with positive identification. All states will now require a photograph as of January 1, 1985.

Assuming for purposes of argument that Quaring has asserted a free exercise claim, the state's compelling interest is sufficient to outweigh any incidental infringement on the free exercise of her religion. The court below characterized her belief as unusual in the twentieth century. The impropriety of state officials determining the religiosity of claims such as Quaring's is compounded by the vast numbers of officials who would be required to make that very determination. The potential for error and personal bias is great. Since the questioning of truth or sincerity is prohibited, the practical effect of the lower court's decision is to create an exemption on demand.

Finally, the creation of an exemption solely on religious grounds constitutes a violation of the Establishment Clause. The very purpose of the Clause is to prevent government officials from evaluating the relative merits of various religious claims. *United States v. Lee*, 455 U.S. 252 (1982).

ARGUMENT

I.

The requirement of a photograph on a driver's license does not violate the Free Exercise Clause of the First Amendment for the reason that the right to drive is not a constitutionally fundamental right.

Two state supreme courts have treated the issue of a photograph requirement in the face of free exercise claims. In a factually similar case, the Colorado Supreme Court rejected a challenge to the photograph requirement by members of the Assembly of YHWHHOSHUA who also based their belief on a literal translation of the Second Commandment. Upholding the state's compelling interest in photographic identification, it found the requirement was an "indispensable underpinning of the purposes underlying the state's interest in issuing driver's licenses." *Johnson v. Motor Vehicle Division*, 197 Colo. 455, 459; 593 P.2d 1363, 1365 (1979). The *Johnson* case was presented to this Court but certiorari was denied. 444 U.S. 885 (1979). A contrary result was reached in *Bureau of Motor Vehicles v. Pentacostal House*, 269 Ind 361, 380 N.E.2d 1225 (1978). The Indiana Supreme Court found a photograph requirement to be unconstitutional as applied to members of the Pentacostal House of Prayer who also believe in a literal reading of the Second Commandment. Unlike *Johnson*, however, that case was not presented to this Court for review.

The threshold inquiry in any First Amendment analysis is whether or not a burden exists at all on the free exercise of religion. The Eighth Circuit concluded that "in refusing to issue Quaring a driver's license, the state with-

holds from her an important benefit." *Quaring v. Peterson*, 728 F.2d 1121, 1125 (8th Cir. 1984). Pet.Cert. A24. The court below relied heavily on *Thomas v. Review Board*, 450 U.S. 707 (1981) and *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Thomas* the issue was whether a state's denial of unemployment compensation benefits to a Jehovah's Witness, who voluntarily terminated his job because of his religious belief, constituted a violation of his First Amendment right to the free exercise of religion. Finding such a violation, the Court noted that "here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; . . ." 450 U.S. at 717.

In *Sherbert*, factually similar to *Thomas*, a Seventh Day Adventist was discharged for her refusal to work on Saturday, her day of worship, and was denied unemployment compensation benefits. This was also considered an infringement. "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodist, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.' " *Sherbert v. Verner*, 374 U.S. at 410.

The critical and preliminary inquiry must be to define the nature of the interest in obtaining a driver's license. It is not whether the photograph requirement infringes upon the free exercise of Quaring's religion. Rather, the preliminary question posed is whether Quaring is entitled to a driver's license as a matter of right. The court below appears to elevate the privilege of obtaining a driver's

license to that of a fundamentally protected right. "Clearly, a burden upon Quaring's free exercise of her religion exists in this case. The state refuses to issue Quaring a driver's license unless she agrees to allow her photograph to appear on the license, a condition that would violate a fundamental precept of her religion. Moreover, in refusing to issue Quaring a driver's license, the state withholds from her an important benefit. . . . The burden on Quaring is indistinguishable from the burden placed upon a Sabbatarian by the state in *Sherbert v. Verner*." *Quaring v. Peterson*, 728 F.2d at 1125, Pet.Cert. A24. It is this faulty assumption regarding the right to a driver's license which belies the remainder of the lower court's analysis. If, in fact, Quaring is not entitled to a driver's license as a matter of right, her free exercise claim does not arise.

No burden should be found on the free exercise of Quaring's religion if the state refuses to create an exception to its otherwise valid photograph requirement. Neither the district court nor the Eighth Circuit held the photograph requirement unconstitutional per se, but only *as applied* to Mrs. Quaring. She does not claim that she is entitled as of right to a nonphotographic license. Rather, she only requests that an exception be made for her because of her personally held belief that the taking of her photograph would violate the free exercise of her religion. Plaintiff's Complaint, A3-10.

Society today is founded upon notions of entitlement. Accordingly, certain levels of protection are afforded differing interests. Professionals have an interest in their licenses to practice, workers have interests in their union contracts and pension rights, and merchants gain an inter-

est in their franchises. All relate to security and independence. However, need or desire alone is insufficient to establish these rights.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). See also, *Arnett v. Kennedy*, 416 U.S. 134 (1974).

It is well established that the power of the state to regulate the use of its highways is broad and pervasive. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). Accordingly, the state may require individuals seeking a driver's license to establish their eligibility for a license in a number of ways. They must demonstrate knowledge of the applicable rules of the road, are required to actually drive a motor vehicle accompanied by an examiner, and must pass a vision test. Additionally, an applicant is required to have his or her photograph affixed to the license pursuant to Neb.Rev.Stat. § 60-406.04 (1982 Supp.) Pet. Cert. A33. It was agreed that Mrs. Quaring met all requirements except that she refused to be photographed. Consequently, she was denied a Nebraska driver's license.

The majority of cases dealing with a person's interest in a driver's license focus on questions of due process. The inquiry is generally couched in terms of the level of

due process afforded an individual who has already been granted a license.

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

(Emphasis supplied.) *Bell v. Burson*, 402 U.S. 535 (1971). We do not reach the inquiry as to the level of due process afforded Mrs. Quaring. If she cannot prove she is entitled to the license, there can be no question of a burden on the free exercise of her religion by the denial of her request for an exception. "Only if a burden is proven does it become necessary to consider whether the governmental interest served is compelling, or whether the government has adopted the least burdensome method of achieving its goal." *Wilson v. Block*, 708 F.2d 735 (1983), *cert. denied* 104 S.Ct. 371, 104 S.Ct. 739.

The cases involving questions of due process are instructive in that they examine the *nature* of the interest involved as it relates to the level of due process that is necessitated. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Goldberg v. Kelley*, 397 U.S. 254, 263 (1970); *Dixon*

v. Love, 431 U.S. 105 (1977); *Bell v. Burson*, 402 U.S. 535 (1971).

The Eighth Circuit's reliance on *Thomas* and *Sherbert* and its characterization of the right to drive as a "benefit", so as to give rise to a free exercise claim, is in error. In its assessment of the alleged burden on Quaring's free exercise of religion, the majority states:

[I]n refusing to issue Quaring a driver's license the state withholds from her an important *benefit*. Quaring needs to drive a car for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home. By requiring Quaring to comply with the photograph requirement, the state places an unmistakable burden upon her exercise of her religious beliefs.

(Emphasis added.) *Quaring v. Peterson*, 728 F.2d at 1125, Pet.Cert. A24. The lower court found the burden on Quaring to be "indistinguishable" from the burden placed upon the Sabbatarian in *Sherbert*. It is this rudimentary error which, of necessity, invalidates the remainder of the lower court's analysis and conclusions.

Both *Sherbert* and *Thomas* dealt with the receipt of public welfare benefits. This Court has clearly drawn a distinction between interests involving financial subsistence and that of having a driver's license.

[A] driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. . . . We therefore conclude that the nature of the interest here is not so great as to require us "to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."

Dixon v. Love, 431 U.S. at 113. Admittedly, this distinction relates to a due process question, but the same analogy may be drawn as to the nature of the interest at issue here. If a driver's license does not rise to the same level as do welfare benefits for purposes of due process, it follows that the same conclusion should be reached for purposes of defining a property interest or entitlement to a license.

The Second Circuit has specifically held that there is no fundamental right to a driver's license. In a suit challenging the constitutionality of a Vermont statute providing for the suspension of the right to drive of persons who have not paid an automobile purchase and use tax assessment, the court found that the plaintiff needed to be able to "drive to visit the doctor, shop for groceries, and attend to other details of family life. No other member of his household holds a driver's license." *Wells v. Malloy*, 402 F.Supp. 856, 858 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2d Cir. 1976). The court rejected a strict scrutiny test in response to an alleged equal protection argument. "In this instance there is no fundamental right. Although a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." *Id.* at 858.

The Fourth Circuit has also held that the revocation of a driver's license does not deprive an individual of any fundamental constitutional right. *Montgomery v. North Carolina Department of Motor Vehicles*, 455 F.Supp. 338 (W.D.No.Car. 1978), *aff'd* 599 F.2d 1048 (4th Cir. 1979). Accordingly, the First Circuit has indicated that, although a plaintiff did not assert a constitutional right to a driver's license, "[W]e may take it as settled that such a

right, federal or state, does not exist." *Raper v. Lucey*, 488 F.2d 748, 751 (1st Cir. 1973).

It is interesting to note that the Indiana Supreme Court in August of this year specifically held that there is no fundamental right to drive. "Neither this Court nor the United States Supreme Court has ever held that there exists a fundamental right to drive a motor vehicle." *Ruge v. Kovach*, 467 N.E.2d 673, 677 (Ind. 1984). The court in *Ruge* also rejected the argument that there exists a fundamental right to drive based upon a right to employment, relying on *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Similarly, it found that the fundamental right to interstate travel did not imply "a fundamental right to drive since the voluntarily induced suspension of a person's driver's license does not necessarily curtail that person's freedom to move from state to state," citing *Shapiro v. Thompson*, 394 U.S. 618 (1969). Given the Indiana Supreme Court's clarification of the nature of the interest involved in a driver's license, its previous grant of an exemption to a photograph requirement on religious grounds and its opinion in *Bureau of Motor Vehicles v. Pentecostal House*, 269 Ind. 361, 380 N.E.2d 1225 (1978), has doubtful significance.

Clearly, the state's grant of a driver's license carries with it the concomitant ability of the state, through its police power, to place whatever reasonable restrictions it wishes on its issuance and use.

Although the privilege might be a valuable one, it is no more than a permit granted by the state, with its enjoyment depending upon compliance with prescribed conditions and always subject to such regulation and control as the state may deem necessary to preserve the safety, health and morals of its citizens.

Ogren v. Miller, 373 F.Supp. 980, 982 (W.D.Ky. 1973). *Perez v. Tynan*, 307 F.Supp. 1235 (D.Conn. 1969). Even if the right to drive were a property right, it would still be subordinate to the state's right to regulate and control its issuance and use. "The Commonwealth, in the exercise of its legislative wisdom, through its police powers, can delineate any reasonable limitations it wishes in bestowing the privilege." *Ogren v. Miller, supra*.

Absent the involvement of a fundamental right, Nebraska's requirement of a photographic driver's license must only bear a rational relationship to the statute's objective. *Wells v. Malloy*, 402 F.Supp. 856, *aff'd* 538 F.2d 317 (2nd Cir. 1976). This was fully met in the lower court's specific finding that quick and accurate identification of motorists and security of financial transactions serve important state interests. The inquiry was complete at that point. The photograph is related directly to the public safety and welfare and the requirement is well within the state's police power. *See, also, Powers v. State Department of Welfare*, 208 Kan. 605, 493 P.2d 590 (1972), holding that a regulation of the State Department of Public Welfare which required a medical examination, contrary to applicant's religious beliefs, as a condition of eligibility for receiving aid to the disabled did not violate applicant's freedom of religion.

A state acting through the police power may reasonably limit the free exercise of religion for the protection of society. Where the exercise of legislative power comes into conflict with the freedom of religion, the validity of legislation will depend upon the balance of the factors affecting the public interest. The individual cannot be permitted on religious grounds to be the sole judge of his duty to obey laws enacted in the public interests.

208 Kan. at 614, 493 P.2d at 597-598.

This Court has recognized the distinction to be drawn between *Thomas* and *Sherbert* and other cases presented for review. In a case involving the imposition of social security taxes upon members of the Amish sect, Justice Stevens in his concurrence noted the tension between that instance and those situations presented in *Sherbert* and *Thomas*. "Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." *United States v. Lee*, 455 U.S. 252 (1982), n. 3, pp. 263-64. The photograph requirement is but one condition imposed prior to the issuance of a driver's license. It is facially neutral and applies to all applicants. There is no property right which arises *prior* to its issuance. Quaring is not being singled out, because of her religion, for adverse treatment. Therefore, this Court's rationale in *Thomas* and *Sherbert* should be limited to a reaction to disparate treatment because of religious views as opposed to the grant of favored treatment for the members of a particular religious sect. Further, the interest being considered here is not of such a nature as to rise to the level of an entitlement.

Sherbert and *Thomas* can also be viewed in light of the greatly expanding area of social welfare legislation encompassing the fields of Social Security, unemployment compensation, public housing, and other forms of public aid. The Court's interpretation of the accommodation of religious belief has, in some part, recognized that individuals become entitled to certain benefits upon meeting statutory requirements of eligibility. "More than thirty years ago the court held that a person may not be com-

pelled to choose between the exercise of a First Amendment Right and participation in an otherwise available public program.” *Thomas v. Review Board*, 450 U.S. at 716. The question of eligibility was also present in *Sherbert v. Verner*.

Here not only is it apparent that appellant’s declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.

374 U.S. at 404. It is the denial of benefits to which these individuals *were otherwise entitled* that gave rise to a First Amendment claim. The nature of the right to drive and its dissimilarity to the interests examined in *Thomas* and *Sherbert* are of significance in the resolution of this case.

The types of “liberty” and “property” protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.

Arnett v. Kennedy, 416 U.S. 134, 155 (1974). There can be no set of inflexible procedures which will be universally applicable to all situations. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

Quaring alleges that she is qualified to be issued a motor vehicle operator’s license, but has been prevented from obtaining it because of her refusal to be photographed as required by statute. She further alleges that she has been denied the privilege freely granted to others who do not hold her religious belief to legally drive motor vehicles. Plaintiff’s Complaint, paragraphs 10, 15; A5, A7. Although not specifically alleged, it would appear that Quar-

ing is asserting a property interest or a "right to drive" despite her noncompliance with Neb.Rev.Stat. §60-406.04, Pet. Cert. A33. Property interests are not constitutionally created. They may, however, arise via existing rules or understandings that stem from state law which support claims of entitlement. *Board of Regents v. Roth*, 408 U.S. at 577. The right to drive or to have an operator's license in Nebraska is expressly created by statute. The requirement of a photograph on Quaring's license is but one of several statutory conditions precedent to its issuance. This Court has viewed skeptically the action of a litigant who challenges the constitutionality of a portion of a statute under which it simultaneously claims benefits.

"It is an elementary rule of constitutional law that one may not retain the benefits of an Act while attacking the constitutionality of one of its important conditions."

. . . .

We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

Arnett v. Kennedy, 416 U.S. at 153-154. Therefore, Quaring's refusal to comply with the photograph requirement should preclude her claim regarding the statute's constitutionality as well as her claim to that license as a matter of right.

A further reason for finding that there is no burden upon the free exercise of Quaring's religion is that there is no coercive impact on her to choose between adherence to her faith and the receipt of a nonphotographic driver's

license. The element of coercion of action which is contrary to religious belief is basic to a free exercise claim. *Sherbert v. Verner*, 374 U.S. 398; *Thomas v. Review Board*, 450 U.S. 707; "An essential element to a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief. (citations omitted) . . . This governmental coercion may take the form of pressuring or forcing individuals not to participate in religious practices." *Sequoyah v. Tennessee Valley Authority*, 480 F.Supp. 608 (E.D. Tenn. 1979); *aff'd* 620 F.2d 1159 (6th Cir. 1980), *cert. denied* 449 U.S. 953 (1980).

The instant situation is markedly different from those involving coercion of action. Quaring's belief is based on her personal and literal interpretation of the Second Commandment which, according to her, precludes the taking of her photograph. The opinion below states that ". . . Nebraska officials correctly point out that the photograph requirement in no way compels Quaring to act in violation of her conscience. . ." *Quaring v. Peterson*, 728 F.2d at 1125, Pet.Cert. A23. However, it then concludes that a burden exists because of the substantial pressure on Quaring to violate her belief. The choice presented to Quaring is whether to forego the privilege of obtaining a driver's license or allow herself to be photographed. The state is not forcing her to act in violation of her belief. Her self-imposed decision to adhere strictly to her faith may prove to be inconvenient and more ex-

pensive, but those reasons are wholly insufficient to give rise to a free exercise claim. *Braunfeld v. Brown*, 366 U.S. 599 (1961).¹ There is no indication that Quaring would be unable to secure alternate means of transportation or to attend church services or to practice her belief. As Judge Fagg correctly pointed out in his dissent, Quaring's difficulties are not insurmountable and she is not the only person faced with the need to make lifestyle adjustments which are precipitated by nonconformity with driver's license requirements. *Quaring v. Peterson*, 728 F.2d at 1125. (Pet.Cert. A31).

The absence of a fundamental right to drive, coupled with the lack of coercion to compel Quaring to act in violation of her faith, mandates the conclusion that there is no burden upon the free exercise of her religion. Absent proof of such a burden, it is unnecessary to consider whether the governmental interest is compelling, or whether the government has adopted the least restrictive alternative of achieving the goal of its regulation. *Wilson v. Block*, 708 F.2d 735 (1983), *cert. denied*, 104 S.Ct. 371, 739. Therefore the lower court's decision should be reversed with no further inquiry as to the competing interests of the state and Mrs. Quaring.

¹*Braunfeld* found no violation of the Free Exercise Clause by a state statute enforcing a Sunday-closing law even though Orthodox Jews adhered to their faith by closing their shops from nightfall on Friday to nightfall each Saturday.

"... [T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." 366 U.S. at 605.

II.

Assuming the existence of a burden upon the free exercise of Quaring's religion, the state's compelling interest in a photographic driver's license outweighs any incidental infringement.

Sherbert sets forth three elements which must be weighed in determining whether a governmental interest "overbalances" the right to the free exercise of religion: first, the importance of the secular value of the regulation; second, the degree of proximity and necessity that the regulation bears to the underlying value; and third, the impact of an exemption on the overall regulatory scheme. Assuming arguendo that Quaring's free exercise of religion is burdened, the lower court's decision is in error relative to the state's compelling interest in ready and instantaneous identification of regulated individuals, including licensed drivers. *Johnson v. Motor Vehicle Division*, 197 Colo. 455, 593 P.2d 1363, cert. denied, 444 U.S. 885 (1979); *Dennis v. Charnes*, 571 F.Supp. 462 (D. Colo. 1983), rev'd and remanded for further proceedings, No. 83-C-1154 (10th Cir. Sept. 24, 1984); *United States v. Lee*, 455 U.S. 252 (1982); *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd 405 U.S. 970 (1972); *Goldberg v. Kelley*, 397 U.S. 254 (1970).

To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, . . . but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." . . .

. . . .

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but

every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 259-261. In defining a state's interest in ready and instantaneous identification of its licensed drivers, the Colorado Supreme Court stated: "The exigencies of law enforcement cannot brook the delay inherent in other means of identification." *Johnson v. Motor Vehicle Division*, 197 Colo. 455, 459; 593 P.2d 1363, 1365. Accordingly, the lower court found two compelling interests in photographic identification and security of financial transactions.² However, it did not agree that these interests were of sufficient magnitude to justify the incidental infringement or the free exercise of religion.

Free exercise claims have been raised against the requirement and/or utilization of social security numbers. These numbers serve an important and compelling state interest in identification—a similar purpose served by photographic driver's licenses. In *Callahan v. Woods*, 559 F.Supp. 163 (N.D. Cal. 1982), the court found, (on remand from the Ninth Circuit after the decision in *Thomas*), that the indirect burden "is heavily outweighed by the government's compelling interest in requiring each

²The importance of the requirement is evidenced by the fact that virtually all states now require photographic licenses, a point also noted by the Eighth Circuit. *Quaring v. Peterson*, 728 F.2d at 1126, Pet. Cert. A26. New York, the most populous state, will begin requiring photographs on licenses as of January 1, 1985. The District of Columbia, the Virgin Islands, Guam and American Samoa have similar requirements.

aid recipient to have a SSN, and the Court further holds that this is the least restrictive means of achieving its all-compelling interest in administrative viability of administering the enormous social security program, . . .” *Id.* at 164.³ The court in *Callahan* relied on *United States v. Lee*, for the proposition of a compelling interest in the administrative viability of the system. A similar argument was set forth by Judge Fagg in his dissent in the instant case.⁴

³On Appeal, the Ninth Circuit has again remanded this case for a determination of the cost of exempting Callahan from the SSN regulation. *Callahan v. Woods*, 736 F.2d 1269 (9th Cir. 1984).

⁴ Nebraska’s photographic license requirement advances the state’s interest in public safety on the streets and highways by providing police officers in the field with an accurate and instantaneous means of identifying motorists. Significantly, a police officer arriving at the scene of an accident or stopping a vehicle in connection with a traffic violation or suspected criminal activity is assured that the individual displaying the license is in fact the individual to whom the license was issued. As noted in the majority opinion, the fact that 47 of the 50 states require a photographic driver’s license indicates the unique advantage derived from this instantaneous identifier.

The majority does not attempt to advance any less restrictive means of accomplishing the state’s compelling interest in “quick and accurate identification of motorists.” Rather, the majority states that in weighing the competing interests involved, it is necessary to consider whether granting “selective exemptions” to the state’s requirement would impair the state’s ability to achieve its objective. This approach simply ignores or casts aside the state’s legitimate interest in assuring instantaneous identification for all of its regular license holders. I am convinced that accommodation of Quaring’s religious practice by issuance of a driver’s license lacking a photographic identifier would “unduly interfere with fulfillment of the governmental interest.” *United States v. Lee*, 455 U.S. 252, 259 (1982). “The ready certainty inherent in photographic identification would be lost.” *Johnson v. Motor Vehicle Division*, 593 P.2d 1363, 1365 (Colo. 1979).

Quaring v. Peterson, 728 F.2d at 1128, Pet.Cert. A30-31.

The court in *Callahan* distinguished *Thomas*, finding it significantly different, "Thomas dealt with a requirement for eligibility for receipts of benefits . . . that constituted the substantive criteria for participation in a government program, but did not affect the fundamental administration of the system as a whole; . . ." The court emphasized the unique identification value of a social security number finding that it is "necessary to enable the system to function." *Callahan v. Wood*, 559 F.Supp. at 169-170. An opposite result was reached in *Stevens v. Berger*, 428 F.Supp. 896 (E.D.N.Y. 1977). However, that decision appears to be based upon insufficiency of evidence presented on behalf of the state. *Mullaney v. Woods*, 158 Cal.Rptr. 902, 97 Cal.App.3d 710 (1979), used the same compelling state interest standard but ruled opposite *Stevens*. "The use of a number to identify each recipient of aid was intended to facilitate the administration of the vast, constantly growing, welfare programs The chief value of a system lies in its ability to apply uniformly to all within its scope, without exception." 158 Cal.Rptr. at 911-12, 97 Cal. App.3d.

It should be noted that twelve states now use a social security number as the driver license number.⁵ Nebraska requires that a social security number appear on its licenses as well as on other forms of identification and that information is accessible through its computer system.⁶

⁵The following states utilize a social security number as the driver's license number: Georgia, Hawaii, Idaho, Indiana, Iowa, Massachusetts, Mississippi, North Dakota, Oklahoma, Virginia and the District of Columbia.

⁶Neb.Rev.Stat. §68-633 (Reissue 1981):

After July 6, 1972, each motor vehicle operator's license issued by the state and each identification card or other form of personal identification issued by any agency of the state or any political subdivision of the state shall set forth the holder's social security number.

The government's interest in uniformity and ready accessibility of information is apparent.

While *Callahan*, *Thomas*, and *Sherbert* all deal with the receipt of social welfare benefits, there appears to be a valid argument that administrative convenience is an important consideration. "The regulation requiring SSN for AFDC [Aid to Families with Dependent Children program] recipients appears to be essential for the system's efficient operation, because the use of SSNs as unique identifiers is by far the most cost-effective means of administering the program." 736 F.2d at 1274. Additionally, *Callahan* is further distinguishable from *Quaring's* claim for the reason that the plaintiff in *Callahan* was otherwise qualified for the benefits.

Another instance of the importance of identification is found in *United States v. O'Brien*, 391 U.S. 367 (1968), *rehearing denied* 393 U.S. 900 (1968), a case dealing with criminal convictions for burning draft cards.

The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

Id. at 377-378. While draft cards are of a more limited use, it is apparent that administrative viability is an important consideration. The central purpose of Nebraska's photograph requirement is identification. The creation of exemptions greatly undermines that legitimate function.

It is evident that the state's interest in instantaneous identification of its licensed drivers and in the security

of financial transactions outweighs any alleged incidental infringement on respondent's free exercise of religion. Uniform administrative regulation is an important consideration. "[T]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. at 606, cited in *Thomas*. The compelling interest of the state is directly related to the safety and welfare of its citizens in general. The ability of a state to limit the free exercise of religion is appropriately given in those instances which involve such matters. *Sherbert v. Verner*, 374 U.S. 398; *Thomas v. Collins*, 323 U.S. 516 (1945).

While it is true that one's interest in maintaining a driver's license is sufficient to warrant due process considerations prior to termination, *Bell v. Burson*, 402 U.S. 535 (1971), the right to drive an automobile upon the public highways is not an absolute right. "Repeatedly we have recognized the legislature's prerogative to subject a licensed driver to reasonable governmental restrictions in the interest of public health, safety and welfare." *Heninger v. Charnes*, 200 Colo. 194, 200, 613 P.2d 884, 888 (1980).⁷ The Colorado Supreme Court entertained a due

⁷ It is almost without question that the state has a vital interest in being able to regulate adequately those driving on its highways. The potential for death and destruction from motor vehicles is great. To further a goal of ensuring that only those able to drive properly are on the roads, the state needs a form of identification. Experience prior to the photographic license indicated that the risk of counterfeiting and trading of licenses was at a level that the in-

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process claim relative to the state's authority to revoke the driver's license of a habitual offender. It found that the doctrine of unconstitutional application would require a demonstration of interference of rights arising under the state or federal Constitution. The claim was rejected, noting that the right to drive is not absolute. 200 Colo. at 200, 613 P.2d at 888.

In examining a Massachusetts statute mandating the suspension of a driver's license for refusal to submit to a breath analysis test, the governmental function was described as follows:

Here, as in *Love*, the statute involved was enacted in aid of the Commonwealth's police function for the purpose of protecting the safety of its people. As we observed in *Love*, the paramount interest the Commonwealth has in preserving the safety of its public highways, standing alone, fully distinguishes this case from *Bell v. Burson*, . . . on which *Montrym* and the District Court place principal reliance. . . . We have traditionally accorded the states great lee-

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tegrity of identification of drivers was in some doubt. Photographic licenses help to resolve this problem. In addition, the state has a vital interest in ensuring that alcoholic beverages are not sold to minors who in turn may be operating motor vehicles on the streets and highways while impaired by the effects of alcohol.

The security of financial transactions also rises to the level of a compelling interest. The statutes cited earlier illustrate a concern with the misuse of financial instruments. Many such misuses could be prevented by accurate identification of the maker of the instrument, and operator's license are a frequently used form of identification for these transactions. As the photographic license serves a purpose of more accurate identification, it furthers a vital state interest.

Quaring v. Peterson, district court opinion, Pet.Cert. A12.

way in adopting summary procedures to protect public health and safety.

Mackey v. Montrym, 443 U.S. 1, 17 (1979). Nebraska's requirement of a photographic driver's license is directly related to the public welfare and safety of its citizens.

Assuming that the requirement does infringe upon the free exercise of Quaring's beliefs, the state's interests are of sufficient magnitude to outweigh any alleged burden. First, the privilege of driving is a highly regulated activity, subject always to the state's broad police powers and administrative and judicial sanctions such as suspension or revocation. Second, the photograph requirement is directly related to public safety and welfare and is compelling in the constitutional sense, as was held by the court below. Finally, a photograph is a unique identifier and no substitute will provide a police officer with "ready and instantaneous" means of identification. *Johnson v. Motor Vehicle Division*, *supra*. Therefore, the state's interest should be found to be of such a compelling nature so as to outweigh any incidental infringement on Quaring's free exercise of her religion.

The third prong of the inquiry is whether or not there exists a least restrictive alternative to the state's requirement of a photograph. *Thomas*, *supra*. Assuming that the photograph requirement is an infringement upon the free exercise of religion, the requirement must still be upheld for the reason that the lower court's judicially mandated exemption presents insurmountable and impermissible obstacles to the administration of the state's issuance of driver's licenses. In reality, less restrictive alternatives are almost always available, provided that the state is willing to sacrifice effectiveness. Although

frequently used as a test, it is not clear what role the concept of "least restrictive alternatives" plays in First Amendment jurisprudence. Courts can frequently decide cases which raise First Amendment questions without appealing to the less drastic means test. However, most cases are decided on a balancing test of the conflicting values and interest.

Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. at 377. See also, Note: Less Drastic Means and the First Amendment, 78 Yale Law Journal 464 (1969).

The Eighth Circuit found that the denial of a non-photographic license to Quaring does not represent the least restrictive means available to accomplish the state's objective. It is unclear in the lower court's opinion, as well as in other case law, what showing is necessary by the government to prove that no other alternative is feasible. It was the testimony of Colonel Kohmetscher, Superintendent of the Nebraska State Patrol, that no other means of identification was an effective alternative to the photographic driver's license. The photograph is a unique identifier and its effectiveness has been demonstrated by a decline in the counterfeiting and misuse of licenses previously experienced (R101:9-105:18).

Additionally, the administration of applications for exemptions would be cumbersome, costly, and would very likely result in disparate treatment. Nebraska's licenses are issued in 93 counties across the state. Every examiner would need to be trained in order to process applications for exceptions, or all would have to be processed centrally through the mail. No indication is given as to the criteria to be used to determine sincerity or eligibility. The Eighth Circuit implies that the record below is insufficient to support Nebraska's position that the creation of exemptions, solely on religious grounds, would render the entire statutory scheme unworkable. However, the critical inquiry is the ability of the state to make *any* evaluation in this area. The difficulty in distinguishing truly religious objectors from those making false claims should weigh heavily in a judicial evaluation of the governmental interest at issue. This is compounded by the fact that any determination as to sincerity of belief in individual cases will frequently be arbitrary.

The court below characterized Quaring's belief as "unusual in the twentieth century. . .", a point the dissent deems significant. This Court has abandoned a narrow and conventional view of religion. However, the expansive treatment which has followed has made it exceedingly difficult and potentially more intrusive to evaluate an individual's belief. The invocation of undue administrative burden is particularly appropriate in this instance where there is also the broad possibility of error in assessing individual claims. Clark, *Guidelines for the Free Exercise Clause*, 83 Harv.L.Rev. 327 (1969).

Perhaps of greater significance is the impropriety of having Nebraska officials determine, on a case-by-case

basis, the religiosity and sincerity of individual beliefs. While asserting the ease with which this can be accomplished, the court below did not examine the dangerous arena into which Nebraska's administrators have been thrust. The situation is compounded by the very nature of the inquiry necessary in order to determine whether or not an exemption should be granted on religious grounds. In the early case of *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court expressed a grave concern that government officials ought not have the capacity to determine whether or not certain causes are religious in nature.

It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the state; that he is *empowered to determine whether the cause is a religious one*, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

(Emphasis added, *id.* at 35.

Given the unusual nature of Quaring's belief, and the willingness of courts to recognize individual and personal beliefs not rooted in recognized and established religions, it becomes apparent that the task set out for Nebraska officials is insurmountable and impermissible. Further, a distinction should be drawn between those actions by a

government agent which are ministerial as opposed to discretionary. In the event that a government official exercises discretion in determining the religious nature of a cause, his actions constitute a prior restraint and lay a forbidden burden upon the exercise of liberty protected by the Constitution. It is axiomatic that governmental questioning of the truth or falsity of beliefs is proscribed by the First Amendment. Further, the difficulty of an investigation of an applicant requesting an exemption is seriously compounded when the relevant belief does not, on its face, fit any generally recognizable religious framework. *Stevens v. Berger*, 428 F.Supp. 896. (E.D.N.Y. 1977).

Comment is made that the evidence does not reflect that a great number of applications for similar exemptions have been made. The danger of reaching a decision based upon such sketchy information is obvious. In determining the additional costs to government, the court must necessarily engage in a highly intuitive process to evaluate the resultant burden on state government. Despite this danger, language concerning the number of possible claimants appears in several decisions. Justice Harlan, in his dissent in *Sherbert v. Verner*, treated the assertion that a constitutional privilege should depend on the number of persons claiming it with an air of incredulity, "[S]urely this disclaimer cannot be taken seriously, for the Court cannot mean that the case would have come out differently if none of the Seventh-day Adventists in Spartanburg had been gainfully employed, or if the appellant's religion had prevented her from working on Tuesdays instead of Saturdays." 374 U.S. at 420-421, n. 2. In this particular instance, the purpose of the statute

is clearly secular, and government is ill-equipped to determine either the sincerity or the religiosity of the claimant's belief. In that situation, "where religious beliefs overlap with secular self-interest, and where the sincerity of religious belief may be harder to define than the sectarian belief in the sanctity of the Sabbath, the government may invoke both administrative difficulty and the broad possibility of error as legitimate factors militating against an exemption." Clark, *Guidelines for the Free Exercise Clause*, 83 Harv.L.Rev. 327 (1969).

Conceding that Quaring's beliefs are "unusual in the twentieth century", the lower court has failed to address the impossibility, much less the impropriety, of forcing administrative officials to determine the religiosity of claims for exemptions. Consequently, it was error to conclude that the incidental infringement on Quaring's belief justified an exemption and that a less restrictive alternative existed in light of the impropriety of administrative determination of religious claims.

III.

The creation of an exemption to the photograph requirement, based solely on religious grounds, contravenes the Establishment Clause of the First Amendment.

The mandated exemption for respondent from the photograph requirement is also in violation of the Establishment Clause of the First Amendment. As recently stated in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984):

The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a

“blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”

104 S.Ct. at 1362. The test to be applied is that set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Initially, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. And finally, the statute must not foster an excessive government entanglement with religion. 403 U.S. 612-613. Requiring an exception for Quaring, solely on religious grounds, clearly contravenes the Establishment Clause as it has been interpreted in *Lemon*. See, also, *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). Justice Stewart, in *Sherbert*, expressed concerns as to the violation of the Establishment Clause in holding that unemployment benefits could not be denied based upon the claimant's refusal to work on Saturdays.

The Court says that South Carolina cannot under these circumstances declare her to be not “available for work” within the meaning of its statute because to do so would violate her constitutional right to the free exercise of her religion.

Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite result. If the appellant's refusal to work on Saturdays were based on indolence, or on a compulsive desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not “available for work” within the meaning of its statute. That being so, the Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed.

Sherbert v. Verner, 374 U.S. at 414-415. J. Stewart, concurring.

These same concerns were raised in *Thomas v. Review Board*. Justice Rehnquist, dissenting, focused on the recent growth of social welfare legislation which has greatly magnified the potential conflict between the two Clauses. "The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment." 450 U.S. at 722. In *United States v. Lee*, Justice Stevens, concurring, noted that:

[T]he principle reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

455 U.S. at 263, n.2.

The decision below falls squarely within the ambit of the concerns raised above. The lower court effectively required the state to make an exception solely on the basis of a claimant's religion thereby creating a violation of the Establishment Clause.⁸

⁸An analogy can be drawn between the instant situation and that presented in *Yott v. North American Rockwell Corporation*, 428 F.Supp. 763 (C.D. Cal. 1977). The constitutionality of a particular statute was at issue which required employers to make reasonable accommodations respecting religious observances and practices. The court pointed out that religious

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Interpretations of the Establishment Clause may vary. But, whatever historical position one takes concerning the development of the Free Exercise Clause and the Establishment Clause, the mandate of the Constitution remains viable. "The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Villanova Law Review 3 (1978) at 24. The finding of the lower court is that the state is compelled to grant an exemption based *solely* on a claimant's religious belief. The Establishment Clause, of necessity, proscribes the granting of an exemption or the conferring of a benefit based entirely upon the religiosity of the claim.

The sincerity and centrality of Quaring's beliefs, while undisputed, are insufficient to support the exemp-

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freedom and secular governmental approach to religious institutions are guaranteed by the First Amendment.

The First Amendment allows no such choice. Government simply cannot make the choice—termed reasonable or otherwise—that conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality. That neutrality may result in a sacrifice from the individual who adheres sincerely to his religious beliefs. Such sacrifice is, however, self-imposed with the rewards being measured outside our temporal ken. However well-intentioned governmental action may be in an attempt to alleviate this sacrifice it cannot survive the clear command of the First Amendment and its interpretation by the Supreme Court . . . (citations omitted).

Id. at 767.

tion under existing constitutional precepts. The decision is supportive only of a means to a desired end. Regardless of the effect on Quaring and her inability to obtain a driver's license, the clear mandate of the First Amendment precludes the carving out of an exemption to a constitutional statute based solely on her individualized belief.

O

CONCLUSION

The district court entered an injunction prohibiting the state from refusing to issue Quaring a nonphotographic license and entered judgment accordingly. No stay of the injunction was granted. The decision was affirmed on appeal to the Eighth Circuit. For the reasons set forth above, the state requests that the decision of the circuit court be reversed and that the injunction be dissolved.

Respectfully submitted,

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